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Attorneys for Defendants CARL'S JR. RESTAURANT 7041 and BY-THE-BAY INVESTMENTS, INC.

U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JEAN RIKER,

CASE NO. C04-01829 JW

Plaintiff,

**PARTIAL CONSENT DECREE
AND ORDER**

v.

CARL'S JR. RESTAURANT 7041;
BY-THE-BAY INVESTMENTS,
INC.; YU CHEN; YEE C CHEN;
ALEXANDER B. CHEN; SELINA
W. CHEN CHAO; JIMMY C. K.
CHEN; MAGGIE W T CHEN; DOE
TRUSTS 1-5; MALL PARKING
LOT OWNERS DOE 6-10; AND
DOES 11-50, Inclusive,

Defendants.

PARTIAL CONSENT DECREE AND ORDER

1. Plaintiff JEAN RIKER filed this action for herself and all other

1 similarly situated members of the public to enforce provisions of the Americans
2 with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101 et seq., and
3 California's Civil Rights laws, against defendants CARL'S JR. RESTAURANT
4 7041; BY-THE-BAY INVESTMENTS, INC.; YU CHEN; YEE C CHEN;
5 ALEXANDER B. CHEN; SELINA W. CHEN CHAO; JIMMY C. K. CHEN;
6 MAGGIE W T CHEN, et al. ("Defendants"). Plaintiff alleged that defendants
7 violated Title III of the ADA, California Civil Code Sections 54.1, and 55, and
8 California Health and Safety Code Sections 19955 *et seq.*, by failing to provide
9 full and equal access and related facilities, including accessible entrances,
10 accessible paths of travel, accessible public restrooms, accessible routes,
11 including from the public right of way, accessible dining facilities, accessible
12 disabled parking, and accessible service counter facilities at the Carl's Jr.
13 Restaurant located at 270 Saratoga Avenue in Santa Clara, California (hereafter
14 "subject restaurant"). Plaintiff alleges that defendants built the restaurant as new
15 construction in 1974 and has performed other alterations within the statutory
16 period for the ADA and/or California law while failing to fulfill mandated access
17 obligations.

18 2. Defendants Answer to the Complaint partially denied these
19 allegations, and by entering into this Consent Order, do not admit liability to the
20 allegations in plaintiff's Complaint filed in this action. The parties hereby enter
21 into this Consent Order for the sole purpose of resolving this lawsuit without the
22 need for protracted litigation.

23 24 JURISDICTION

25 3. The parties agree that the Court has jurisdiction of this matter
26 pursuant to 28 USC §1331 for violations of the Americans with Disabilities Act
27 of 1990, 42 USC 12101 *et seq.*, jurisdiction for standing under Article III of the
28 United States Constitution, and pursuant to pendant jurisdiction for violations of

1 California Health & Safety Code Sections 19955 *et seq.*, including Section 19959;
2 Title 24 California Code of Regulations; and California Civil Code Sections 54;
3 54.1; 54.3; and 55.

4 4. This agreement is contingent upon Court approval and acceptance of
5 normal jurisdiction to interpret and enforce this Consent Decree.

6 5. The parties agree to entry of this Order in order to resolve the below
7 listed allegations raised in the Complaint filed with this Court on May 10, 2004.
8 Accordingly, they agree to the entry of this Consent Decree without trial or
9 further adjudication of any issues of fact or law concerning the issues specified
10 herein, and without prejudice to plaintiff's sole remaining injunctive relief claim
11 relating to the accessibility of the path of travel from the boundary of the site to
12 the main entrance of the Carl's Jr. Restaurant, as well as plaintiff's remaining
13 claim for reasonable statutory attorney's fees, litigation expenses and costs.

14 WHEREFORE, the parties hereby agree and stipulate to the Court's entry
15 of this Consent Order, which provides as follows:
16

17 **RESOLUTION OF INJUNCTIVE RELIEF:**

18 6. Except as specified in paragraph 10, below, this Consent Decree
19 shall be a full, complete, and final disposition and settlement of the below claims
20 for injunctive relief and damages that have been or could have been alleged in the
21 Complaint. The parties agree that there has been no admission or finding of
22 liability or violation of the ADA and/or California civil rights laws, and this
23 Consent Order should not be construed as such. The Court shall retain
24 jurisdiction of this action to enforce and interpret this Consent Decree. The
25 parties agree that if they or any of them seek Court enforcement of this Consent
26 Decree and Order, any such enforcement will be by noticed motion, application
27 or other appropriate request for an order for specific performance and that a
28 contempt citation or decree will not be sought by any party.

Partial Consent Decree and Order:

Case No. C04-01829 JW

Version: 2005-08-26 - 6:50 AM - FINAL DRAFT

1 7. With respect to the injunctive relief and damage claims resolved by
2 this Order, the parties acknowledge that they waive the provisions of and any
3 benefits that may be conferred by Civil Code section 1542 which reads:

4 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS**
5 **WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT**
6 **TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING**
7 **THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE**
8 **MATERIALLY AFFECTED HIS SETTLEMENT WITH THE**
9 **DEBTOR.**

10 The provisions of this paragraph shall not affect the reserved issues specified in
11 paragraph 10, below.

12 **INJUNCTIVE RELIEF:**

13 8. The defendants agree to perform the following work to provide
14 disabled access at the subject restaurant:

15 a. **Parking.** Defendants will fill in the missing information on
16 parking signage indicating where towed vehicles may be recovered.

17 b. **Entrances.**

18 1) **Directional Signage.** Defendants shall provide
19 directional signage at the non-accessible entrances indicating the location of the
20 accessible entrances.

21 2) **ISA Signage.** Defendants shall install proper ISA
22 signage at the accessible main entrance.

23 3) **Door Pressure.** Defendants shall adjust all door-
24 openers at public entrances to a maximum allowable operating pressure of 5 lbs.

25 4) **Threshold at Main Entrance.** Defendants shall
26 provide a compliant threshold at the accessible main entrance.

27 5) **Strike Side Clearance.** Defendants shall provide a
28 compliant strike side landing at the front dining entrance by extending the
concrete to provide a minimum of 24 inches of strike side clearance.

1 6) **Kickplate.** Defendants shall provide a compliant kick
2 plate on the rear dining door.

3 c. **Landing at Telephone.** Defendants shall provide a clear and
4 level landing in front of the public telephone, and remove any obstructions within
5 landing.

6 d. **Interior Dining Facilities.**

7 1) **Dining Tables.** Defendants shall provide one further
8 accessible dining table in the restaurant with a compliant table top height and
9 compliant knee space.

10 2) **Condiments and Service Counters.** Defendants shall
11 relocate the condiments, straws, napkins and other self-service items on the
12 service counter so as to move these items closer to the counter's front edge and
13 thereby eliminate the "reach over an obstruction" condition that currently exists.

14 e. **Public Restrooms.** Defendants shall reconstruct their public
15 restroom facilities consistent with the drawings of plaintiff's consultant Karl
16 Danz attached hereto as **Exhibit 1**, or pursuant to another equivalent design that
17 strictly complies with the performance standards for new construction, as noted
18 below. All bathroom fixtures, grab bars and other amenities within the
19 reconfigured restrooms shall also strictly comply with such performance
20 standards.

21 f. **Performance Standards.** All of the foregoing facilities shall
22 be brought into full and strict compliance with the literal requirements of the
23 California Code of Regulations, Title 24-2 (2001), and Americans with
24 Disabilities Act Accessibility Guidelines.

25 g. **Conflict in Performance Standards.** In the event of a
26 conflict between the two sets of regulations, the provisions that supply maximum
27 protection and accessibility to the disabled shall apply.

28 h. **Construction Tolerance.** The remediations hereunder shall

1 allow for any recognized construction tolerances specifically provided by code.
2 This includes the construction tolerances provided by the Handbook of
3 Construction Tolerances, by David Ken Ballast, McGraw Hill, published in 1994.

4 i. **Option to Close Facilities.** In lieu of making modification to
5 any particular facility or amenity called for by this decree, the defendants may
6 choose to permanently close such facility or amenity.

7 j. **Time for Compliance.** As to all other work, defendants shall
8 submit plans and apply for any necessary permits for this work within 180 days of
9 the entry of this Order on the docket of the court, and complete all such work
10 within six months of receiving permits, allowing for good faith interruptions due
11 to inclement weather, contractor unavailability, and other causes under the
12 Doctrine of Force Majeure.

13 k. **Enforcement.** Should Plaintiff in the future become aware of
14 any facts or conditions relating to the subject restaurant that may give rise to a
15 claim that Defendants have failed to comply with any of the injunctive relief
16 provisions set forth herein, Plaintiff shall, prior to seeking enforcement from this
17 Court, provide notice to Defendants' current counsel, Ian Fraser-Thomson, Esq.
18 and Renton Rolph, Esq., in writing, addressed to their then current addresses as
19 registered with the State Bar, with a courtesy copy addressed to owner-defendant
20 By-The-Bay Investments, C/o Wood DeMayo at the restaurants address on
21 Saratoga in Santa Clara. The restaurant shall have sixty (60) days, following
22 receipt of such notification to undertake to correct the alleged violation and/or
23 respond to Plaintiff's allegations. Any response made by Defendants shall be in
24 writing, addressed to Plaintiff's counsel, Tim Thimesch of the Thimesch Law
25 Offices, at his then current address registered with the State Bar. Plaintiff's
26 counsel agrees to contribute pro bono up to three hours in any given calendar year
27 toward these informal negotiation efforts. If Plaintiff determines, in her own
28 good faith discretion, that the matter(s) are not resolved by Defendants' response,

1 Plaintiff shall be permitted to file a noticed motion under the current case number
2 of this action seeking enforcement of this Consent Decree. The prevailing party
3 in such motion proceedings, whether in full or in part, may be entitled to an award
4 of reasonable attorney fees, litigation expenses and costs for such motion, i.e., the
5 fee recovery shall be pursuant to the normal prevailing party standards that
6 applied before the action's full dismissal.

7
8 **RESOLUTION OF PLAINTIFF'S DAMAGE CLAIM:**

9 9. Defendants shall pay plaintiff \$22,500 in full resolution of all
10 compensatory damage claims brought under her complaint. A check for this
11 amount shall be delivered into plaintiff counsel's hands within 10 days of the
12 Court's execution of this order. The check shall be made out solely to
13 "Jean Riker."

14
15 **RESERVED INJUNCTIVE RELIEF CLAIM RE PATH OF TRAVEL TO**
16 **BOUNDARY OF SITE AND RE ATTORNEY FEES, LITIGATION**
17 **EXPENSES AND COSTS:**

18 10. Plaintiff agrees to dismiss all named defendants in relation to all
19 injunctive relief and damage claims.

20 11. Plaintiff stipulates that all of her damage claims have been resolved
21 through this consent decree.

22 12. Plaintiff stipulates that through this consent decree, all injunctive
23 relief claims related to the restaurant and the configuration of its immediate
24 surrounding parking facilities have been resolved.

25 13. The parties have not reached an agreement regarding Plaintiff's
26 claim for attorney fees, litigation expenses and costs for this case (and any
27 appropriate enhancement), and reserve such issues for trial or appropriate
28 disposition. The parties agree to continue their attempt to compromise Plaintiff's

1 remaining claim for attorney fees, litigation expenses and costs.

2 14. Therefore, if the Court approves the Consent Decree and limited
3 request for dismissal and the stipulated reduction in issues, the parties request the
4 setting of the following schedule for moving for an award of fees, costs and
5 expenses, which includes reasonable attorneys fees incurred in making the
6 motion: 1) the deadline for filing the motion shall be within 60 days after entry of
7 this order; 2) the deadline for defendants to file any opposition papers shall be
8 within 30 days of the filing of plaintiff's notice of motion; 3) any reply papers
9 shall be with 15 days thereafter. Plaintiff may move for an award of fees, costs
10 and expenses, which include reasonable attorneys fees incurred in the action and
11 in pursuing her Motion for Award of Reasonable Statutory Attorney's Fees,
12 Litigation Expenses and Costs, and defendants may state objections to an award
13 of costs through their opposition papers. These procedures shall apply in lieu of
14 the procedures specified in Civil Local Rules 54-1 through 54.6, with the
15 exception that counsel should comply with Rule 54-6(a) with respect to meet and
16 confer requirements and that sub section (b)(1) through (3) shall apply re form of
17 motion and the court's prerogatives as set forth in said Local Rule.

18 15. Notwithstanding any statement in this Decree regarding defendants'
19 dispute of the allegations and/or non-admission and denial of liability, the parties
20 agree that plaintiffs have prevailing party standing to make a motion for
21 reasonable fees, litigation expenses and costs. Defendants reserve all rights to
22 oppose such a motion.

23
24 **ENTIRE CONSENT ORDER:**

25 16. This Consent Order and the Exhibit attached hereto, constitute the
26 entire agreement between the parties on the matters of injunctive relief, and no
27 other statement, promise, or agreement, either written or oral, made by any of the
28 parties or agents of any of the parties, that is not contained in this written Consent

1 Order, shall be enforceable regarding the matters of injunctive relief described
2 herein. The issues specified in Paragraph 13 shall constitute the sole matters
3 reserved for trial or further disposition.

4
5 **CONSENT ORDER BINDING ON PARTIES AND SUCCESSORS IN**
6 **INTEREST:**

7 17. The parties agree and represent that they have entered into this
8 Consent Decree voluntarily, under no duress, and wholly upon their own
9 judgment, belief, and knowledge as to all matters related to this Consent Decree,
10 after having received full advice from counsel.

11 18. This Consent Decree and Order shall be binding on Plaintiff
12 JEAN RIKER, and Defendants CARL'S JR. RESTAURANT 7041; BY-THE-
13 BAY INVESTMENTS, INC.; and any successors in interest. During the period
14 of this Consent Decree, the parties have a duty to so notify all such successors in
15 interest of the existence and terms of this Consent Decree and Order during the
16 period of the Court's jurisdiction of this Consent Decree. To the extent permitted
17 by law, the parties intend that this Consent Decree and Order shall additionally be
18 binding upon all persons with disabilities similarly situated to plaintiff, and that
19 the terms shall have the effect of res judicata and/or collateral estoppel.

20
21 **JOINT PREPARATION AND SEVERABILITY:**

22 19. This Consent Decree and Order is deemed jointly prepared by all
23 parties and shall not be strictly construed against any party as its drafter. If any

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25 ////

1 term of this Consent Order is determined by any court to be unenforceable, the
2 other terms of this Consent Order shall nonetheless remain in full force and
3 effect.

4
5 **SIGNATORIES BIND PARTIES:**

6 20. Signatories on the behalf of the parties represent that they are
7 authorized to bind the parties to this Consent Decree and Order.


8 **SIGNATORIES BIND PARTIES:**

9 21. This Consent Decree may be executed in counterparts signatures,
10 and such signatures may be attached in counterparts, each of which shall be
11 deemed an original, and which together shall constitute one and the same
12 instrument. Such counterparts may be signed as faxed signatures, which shall
13 have the same force and effect as original signatures.

14
15 Dated:

16
17 Plaintiff JEAN RIKER

18
19 Dated: Aug 29, 2005

20
21 
22 WOODY DEMAYO on behalf of
23 Defendants BY-THE-BAY
24 INVESTMENTS, INC. dba CARL'S JR.
25 RESTAURANT 7041

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27 ///

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1 APPROVED AS TO FORM:

2 Dated: Aug 11, 2005

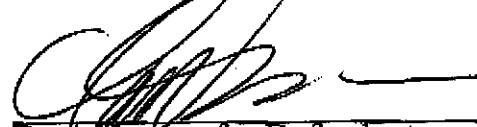
Thimesch Law Offices
TIMOTHY S. THIMESCH

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5 Attorneys for Plaintiff
6 JEAN RIKER

7 Dated: Aug 30, 2005

8 CESARI, WERNER AND MORIARTY
9 IAN FRASER-THOMSON
10 KRISTINA L. VELARDE

11 

12 By Attorneys for Defendants
13 BY-THE-BAY INVESTMENTS, INC.,
14 dba CARL'S JR. RESTAURANT 7041

15 Dated: Aug __, 2005

16 JAMES & McCLELLAN
17 RENTON H. ROLPH, ESQ.

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19 By Attorneys for Defendants
20 BY-THE-BAY INVESTMENTS, INC.,
21 dba CARL'S JR. RESTAURANT 7041

22 ORDER

23 IT IS SO ORDERED.

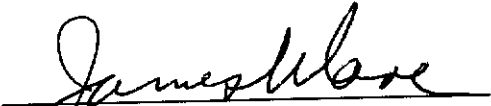
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26 Dated: _____, 2005

27 HON. JAMES WARE
28 JUDGE OF U.S. DISTRICT JUDGE

ORDER

Pursuant to stipulation, and for good cause shown, **IT IS SO ORDERED.**
The Clerk shall close the file, subject to being reopened on motion to enforce the provisions of the Consent Decree.

Dated: September 22, 2005


HON. JAMES WARE
U.S. DISTRICT JUDGE

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